86-792

No. 86-_____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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LEOPOLD KOPPEL AND PAUL KOPPEL,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Did the trial judge's charge to the jury violate petitioner's Sixth Amendment right to trial by jury by directing the jury to find essential facts disputed by the defendants.

2. Where the defendants discovered after the jury returned its verdict that the prosecutor had deliberately violated the District Court's order to turn over names of exculpatory witnesses to the defendant with knowledge that the defendants believed the prosecutor had complied with the order, did the District Court err in holding that *United States* v. *Agurs*, 427 U.S. 97 (1976), and *United States* v. *Bagley*, 473 U.S., 105 S.Ct. 3375 (1985), did not apply and that to obtain a new trial the defendants would have to meet the more demanding standard usually applied to newly discovered evidence claims?

3. Did the Court of Appeals erroneously hold that Count 2 of the indictment charged, and that the jury convicted the defendants of, a felony despite the Meat Inspection Act's explicit provision that all offenses are misdemeanors unless the government proves conduct that was neither charged by the grand jury nor mentioned to the petit jury?

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### OPINION BELOW

The opinion of the court of appeals is unpublished and unreported. It is reproduced in the Appendix to the petition at App. 1-2.

### JURISDICTION

The judgments that are the subject of this petition were dated and entered July 1, 1986. The decision of the Court of Appeals was handed down on October 31, 1986. Review by writ of certiorari is sought pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

*21 U.S.C. § 601m(1), (4):* "The term 'adulterated' shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

"(1) if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;

. . .

"(4) if it has been prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; . . . ."

*21 U.S.C. § 610:* "No person, firm or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals

. . .

"(c) sell, transport, offer for sale or transportation, in commerce, (1) any such articles which (A) are capable of use as human food and (B) are adulterated or misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation. . . ."

*21 U.S.C. § 676(a):* "Any person, firm or corporation who violates any provision of this chapter for which no other criminal penalty is provided by this chapter shall upon conviction be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if such violation involves intent to defraud, or any distribution or attempted distribution of an article that is adulterated (except as

defined in section 601(m) of this title), such person, firm, or corporation shall be subject to imprisonment for not more than three years or a fine of not more than $10,000, or both; *Provided*, That no person, firm, or corporation, shall be subject to penalties under this section for receiving for transportation any article or animal in violation of this chapter if such receipt was made in good faith, unless such person, firm, or corporation refuses to furnish on request of a representative of the Secretary the name and address of the person from whom he received such article or animal, and copies of all documents, if any there be, pertaining to the delivery of the article or animal to him."

## STATEMENT OF THE CASE

Leopold and Paul Koppel, the petitioners, were President and Vice-President of their family owned business, the Fort Plain Packing Co. Inc., when they and the company were indicted on September 20, 1985. The grand jury charged the three defendants with two counts of violating the Meat Inspection Act, 21 U.S.C. § 601 *et seq.*[1] The first count alleged a conspiracy to defraud the United States and to distribute and attempt to distribute adulterated meat. All three were acquitted by a petit jury on this charge. The second count charged the three defendants with selling, offering to sell, or transporting adulterated meat. The petit jury acquitted the company, but convicted the individual defendants, who seek review in this Court.[2]

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[1] The indictment is set forth in the Joint Appendix (J.A.), which was submitted to the court of appeals, at 9-14, with count 2 appearing in a single, short paragraph at pages 13-14. The facts stated herein are accompanied by citations to the Joint Appendix.

[2] The district court sentenced Leopold Koppel to two years incarceration, with all but six months suspended, and a $10,000 fine. It

Count 2 of the indictment purported to cover a period from July 28, 1983 until November 30, 1984, although the Fort Plain plant was not even open during three or four months of this period, as the prosecutor conceded in his opening statement. (J.A. 43) The indictment did not indicate how many times the petitioners supposedly sold, offered for sale, or transported adulterated meat, nor does it suggest approximately when any act occurred.[3]

At trial, the government presented fifteen witnesses. Three were government officers, and twelve were employees. The government attempted to prove that the petitioners had done several things that resulted in adulterated meat. It endeavored to show that the petitioners picked up meat from the floor of the plant and improperly placed that meat in edible containers, that the petitioners had taken meat from carts containing inedible meat and attempted to recondition it, and that they turned off sterilizers used by the boners to clean their knives.[4]

Six government witnesses—Paul Looman, Randall Trombley, Robert McCullough, Gordon Borst, Everett

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sentenced Paul Koppel to one year incarceration, but suspended this portion of the sentence in its entirety and placed the defendant on probation, and also imposed a $10,000 fine. The court of appeals granted release to Leopold Koppel pending appeal.

[3] Not only did the indictment fail to allege whether an act took place in November 1983 or November 1984, but no witness testified at trial as to the approximate dates on which acts occurred. Thus, there is no way of knowing whether any act upon which the jury might have convicted took place early, late or at any particular time within the period covered by the indictment.

[4] The government also attempted to offer evidence concerning dirty meat hooks, but no witness testified that the hooks were sufficiently unclean to produce contaminated or adulterated meat.

Palmer, and Martin Siuta—testified that they worked as boners, i.e., they removed meat from bones. Looman testified that he saw Leopold and Paul Koppel pick meat from the floor, put it in a coat pocket, and leave the boning room, but he did not know what was done with the meat. (J.A. 352-55) McCullough gave similar testimony.[5] (J.A. 419, 432-33) Looman also testified that Leopold Koppel turned off some of the sterilizers in the plant during the day. (J.A. 358-59) Trombley testified that on a single occasion he saw Leopold Koppel take meat from an inedible cart (J.A. 409) and that on other occasions he saw Leopold Koppel bring bones back to boners, but he did not know their origin. (J.A. 410). McCullough testified that Leopold Koppel would daily remove bones from inedible carts. (J.A. 421) Other witnesses testified that they saw Leopold Koppel remove bones from an inedible container, and one witness testified that he saw Paul Koppel do so.[6] Other witnesses testified that some sterilizers were turned off from time to time.[7]

Dr. John Huckins, a supervisory veterinary medical officer, was in charge of meat inspection at the Fort Plains plant. (J.A. 88) Two inspectors, Samuel Hairston and Ciro DeGennaro, who also testified at trial, worked under Huckins' supervision. Huckins testified as to the "statistical approach" to inspecting samples of meat and stated that "the statisticians have determined that we get very good control of the meat and the quality of the meat and

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[5] Other witnesses testified similarly. *See* Testimony of Palmer, J.A. 544, 546. Testimony of Siuta, J.A. 589-92.

[6] See Testimony of Charles Mykel (laborer), J.A. 450-51; David Ouderkirk (loader), J.A. 511.

[7] See Testimony of Trombly, J.A. 416; Testimony of Borst, J.A. at 438; Testimony of Siuta, J.A. at 497.

the cleanliness of the meat" by using this approach. (J.A. 109)

Hairston explained the sampling approach in greater detail, referring to it as a random sampling plan. (J.A. 193) He explained that the petitioners never knew which meat container would be selected for sampling (J.A. 194) and that samples weighing twelve pounds would be taken from each container he decided to sample. (J.A. 194) Although he was uncertain as to the precise quantity of meat inspected, he referred to it as "a lot of meat" and indicated that he might have inspected thousands of pounds a week. (J.A. 196, 231) He testified that the only problem he encountered, and "not very often" was that some "little scraps" would be found in the barrels and that these were removed. (J.A. 195) Hairston indicated that as a result of approximately 800 inspections of a series of twelve pound samples, he never found a single piece of meat with salt on it. (J.A. 212)[8] He stated that he might have sampled a total of 50,000 pounds of meat during the approximately 50 weeks he did the inspections. (J.A. at 231) He further testified that, while he had little information concerning the buyers of the petitioners' meat, he was aware that any meat shipped would be inspected when it was received, he would have been informed if any meat had been rejected, and not a single piece of meat was rejected "for any contamination" or "adulteration." (J.A. 249)[9]

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[8] This was significant in light of the government's allegation that meat that had fallen on the floor where there was salt had been improperly placed in edible food containers.

[9] Ciro DeGennaro testified that he worked as an assistant to Hairston (J.A. 309) and that he reported any "deficiencies" that he observed to Hairston, (J.A. 318) but his testimony indicates that Hairston was the inspector in charge who made decisions on what, if anything, should be done.

Thus, Hairston was unable to find a single piece of contaminated or adulterated meat in random inspections of meat over 50 weeks, and not a single piece of meat was reported to be contaminated at the receiving end of a shipment. Moreover, Dr. Huckins testified that it was perfectly acceptable to "recondition" meat that had been contaminated by falling on the floor or similar events, and that reconditioning could be accomplished simply by trimming the dirty portion of the meat. (J.A. 111-12) The testimony by government witnesses demonstrated that the petitioners did recondition meat in this manner and that they asked employees to do so.[10]

Dr. Huckins testified that he did not permit reconditioning of meat that had once been placed in a container for inedible meat. (J.A. 116) As indicated above, employees testified that the petitioners had removed bones from inedible containers, but not a single witness testified that he or anyone else ever reconditioned these bones and permitted them to work their way into edible containers. On the one occasion when Trombley stated he saw Leopold Koppel take meat from an inedible cart, Trombley reported this to James Dean, who removed the improper meat and explained to Paul Koppel, so that he could relay the information to Leopold Koppel, that this reconditioning could not be done. (J.A. 641) Similarly, Borst testified that on one occasion he was asked to retrim

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[10] For example, Palmer testified that Paul Koppel picked up a piece of meat that had fallen on the floor and asked him to retrim it. J.A. 475-76. He further testified that both Koppels would use his table to recondition meat by trimming if it had fallen on the floor. Siuta testified that Leopold Koppel picked meat up off the floor and put it in a pail for trimming. J.A. 495-96. No government witness was asked whether either defendant ever picked meat off the floor and placed it in a container of edible meat without first reconditioning it.

meat he had thrown away, but he refused to do so. (J.A. 434-35) Ouderkirk testified that he declined to return bones to the boners for retrimming. (J.A. at 509)

Finally, every witness for the government who testified about sterilizers being turned off also testified that there was never an occasion where the absence of a sterilizer resulted in the use of an unclean instrument. There was always a sterilizer available, and no witness indicated that the available sterilizer was not used.[11]

The petitioners called James Dean, the foreman of the boning room, to testify on their behalf. He confirmed that the petitioners had properly reconditioned meat that had fallen on the floor or had asked him to do so, (J.A. 610-11), that a sterilizer was always available (J.A. 612), and that on the only occasion of which he was aware when one of the petitioners had brought a bone back for reboning after it had been in a container of inedible meat, he had removed the bone and instructed Paul Koppel that it could not be reboned. (J.A. 641) He explicitly stated that the meat was thrown out.(J.A. 641) On cross-examination, the government elicited testimony that following this incident there was "a directive" to the employees never to take meat out of an inedible container. (J.A. 626-27)

The government attacked Dean on the ground that he was friendly to the petitioners, and the petitioners

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[11] Looman testified that one sterilizer was always available. J.A. at 369. Trombly concurred. J.A. 414. Borst's only complaint was that sometimes he had to walk farther than he preferred to gey to the sterilizer. J.A. 436. Siuta said his sterilizer was always on. J.A. 497. Dillenbeck stated that he could turn on a sterilizer any time he wanted to, J.A. 562, and that on the one occasion his sterilizer was not working, he used another knife until the sterilizer came back on. J.A. 560-61.

rested, unaware that the government had concealed the fact that two other employees had indicated that they would corroborate Dean if called to testify and provide testimony that would have greatly bolstered the petitioners' defense.

Prior to trial the petitioners had complained to the trial judge that, although they had hired an investigator, they were unable to persuade employees who had worked at the plant to speak with them so that they could prepare their defense. Despite the prosecutor's resistance, the trial judge specifically ordered the government to disclose the names of all employees whom it interviewed if those employees stated that they did not observe the acts alleged by other employees, which acts led to the indictment in this case. (J.A. 15-16) By letter dated April 8, 1986, the government listed ten people "who were either interviewed by government agents or who have testified before the grand jury and who claim to have no personal knowledge of the overt acts in question during the time frame of the indictment." (J.A. 860) Just before the trial began, defense counsel expressed concern that the government had not fully complied with the Court's order, (J.A. 27-30), but the prosecution represented that it had complied. (J.A. 27-30)

After the trial ended, two employees, Bradford Cook and Marc Skottke, who had been subpoenaed but not called to testify by the government, came forward and told the petitioners that on April 9, 1986, they met with the prosecutor and told him they did not see the acts alleged in the indictment. Cook submitted an affidavit (J.A. 861-62) stating that he had not observed either defendant pick meat off the floor and put it into edible containers without trimming it or shut off sterilizers, acts that government witnesses claimed to have seen. His

affidavit also indicated that when Paul Koppel had removed a bone from an inedible container, the purpose was to show the boner how to do a better job, not to obtain meat as the government witnesses implied. Skottke submitted a similar affidavit. (J.A. 863-64) The petitioners filed a post-trial request for a new trial based upon the suppression of these names and the violation of the district court's pretrial order on which they had relied. The district court denied the motion. (J.A. 934)

After judgment was entered, petitioners unsuccessfully appealed to the United States Court of Appeals for the Second Circuit, which affirmed their convictions in a two-page summary order.

## REASONS FOR GRANTING THE WRIT

Three reasons warrant a grant of the petition for certiorari. First, the district court effectively directed a verdict against the petitioners when it gave a *sua sponte* jury instruction that reasonable juries would have taken as requiring them to find that petitioners were involved with "adulterated" meat when that fact was one of the elements the government had to prove beyond a reasonable doubt. Immediately after this instruction was given, petitioners' counsel complained that it was tantamount to a directed verdict and asked the district court to remedy its usurpation of the jury's role by giving a corrective and clarifying instruction. The district court denied the request and thereby removed from the prosecution the burden of proving at least one essential element of the government's case. The instruction might also have led a reasonable jury to believe that the trial judge directed a verdict with respect to the element of "transport." Thus, the resulting convictions violate the principles that this Court enunciated in *Sandstrom* v. *Montana*, 442 U.S. 510

(1979), and reaffirmed in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983). The court of appeals misapplied this Court's decisions when it stated that "the court's charge to the jury on the elements of the offense was not error when read in context of the charge as a whole," and that "[t]he district court correctly charged the jury that it must find guilt beyond a reasonable doubt with respect to each and every element of the crime." The undeniable fact is that the district court defined at least one element of the crime in a way that mandated a conviction.

Second, this case involves a fundamental question of prosecutorial responsibility to provide defendants information that is covered by a specific order entered by a federal judge. The prosecutor confessed in post-trial proceedings that he personally interviewed two witnesses, former employees of the petitioners, a week before the trial and that both witnesses stated that they did not see the acts that the government alleged against the defendants. The prosecutor conceded that he made a deliberate decision not to reveal the names of these two witnesses to the petitioners despite a specific order of the district court that the prosecutor had to disclose the names of all employees who were interviewed and who denied seeing the alleged acts. The only justification for nondisclosure was that the prosecutor believed he could impeach these witnesses. Instead of complying with the district court's order and revealing the names, the prosecutor provided the petitioners' counsel with notes written more than a year earlier by an investigator[12] which misled them and caused them to believe that the two witnesses would be unfavorable to the defense, when the prosecutor knew

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[12] The petitioners had complained to the district court that this investigator had attempted to intimidate witnesses. J.A. 24-26.

that they would corroborate the testimony of petitioners' key witness, James Dean. To be sure that the defendants would not catch the deception, the prosecutor subpoenaed the two witnesses, making it appear that the government believed that they were prepared to testify favorably for the prosecution even though the prosecutor knew this was untrue. The district court held that this conduct violated neither *United States* v. *Agurs*, 427 U.S. 97 (1976), nor *United States* v. *Bagley*, 473 U.S., 105 S.Ct. 3375 (1985). The court of appeals apparently agreed, for it did not address the conduct in its opinion. Petitioners contend that the prosecutor breached the duty imposed by this Court and that summary approval of such egregious behavior threatens to encourage the worst kind of prosecutorial misconduct in the future.

Finally, the grand jury charged in the second count of the indictment that petitioners sold, offered to sell, or transported adulterated meat on various unspecified occasions. It did not charge that they distributed or attempted to distribute adulterated meat or that they defrauded the United States, the only felonies set forth in the relevant statute, 21 U.S.C. § 676(a). The words "distribution," "attempted distribution," or "defraud" were not used in the district court's instructions on Count 2, but the district court sentenced petitioners for a felony anyway. The court of appeals affirmed, stating that "[t]he indictment's language charging defendants with a scheme to sell, transport or attempt to sell is the functional equivalent of the term "distribution." Not only did the indictment fail to allege a scheme, but the grand jury deliberately omitted from Count 2 the words that would have charged a felony after including them in the first count. The effect of the rulings by the lower courts is to disregard the teachings of this Court in *United States* v.

*Miller*,471 U.S. 130 (1985), and *Stirone* v. *United States*, 361 U.S. 212 (1960).

### A. The Trial Judge's Instruction To The Jury Effectively Directed A Verdict Against The Petitioners

Count 2 of the indictment charged only that the petitioners "did willfully and knowingly sell, transport, or offer for sale in commerce" adulterated meet. To convict, the jury had to find that the government proved beyond a reasonable doubt *inter alia* two things: that there was adulterated meat, and that there was also a sale, offer to sell, or some transport. To assure that the jury understood the burden that the government had to bear, the petitioners asked the trial judge to specifically tell the jury that picking meat off the floor and putting in a pocket was not an offense. (J.A. 817) Although the prosecutor expressed no objection to the charge (J.A. 816) and the trial judge indicated he would give it (J.A. 816), without prior notice to the petitioners and over their immediate objection, he added words *sua sponte*, so that he instructed the jury as follows:

> I charge you, which is simple common sense, that picking meat up off the floor and placing it in somebody's pocket is not a violation of any kind. *Taking it out of their pocket later and putting it in an edible meat container, that is*. (J.A. 843) (Emphasis added).

Immediately after delivering this part of the charge, the judge added that the acts of the petitioners must have been knowing and willful, which he explained meant that the petitioners must have intended to act as they did. Thus, he told the jury that it could convict the petitioners if it found that they put meat that had been on the floor in an edible meat container.

The effect of the *sua sponte* instruction was devastating to petitioners. The relevant federal statute, 21 U.S.C. § 601(m) defines the term "adulterated." Count 2 of the indictment charged that the meat which was the basis of that count "was adulterated within the meaning of the Federal Meat Inspection Act in that said meat had been prepared, packed and held under insanitary conditions whereby it may have been contaminated with filth." The question for the jury was whether, assuming that it believed that a piece of meat might have fallen on the floor and had been picked up and used as edible meat, that meat was in such a condition that it may have been contaminated with filth.[13] Neither the statute nor the indictment makes it a crime merely to use meat that had been on the floor. If the meat was clean, if a defendant carefully examined it and restored it, or if it was not contaminated, the jury was entitled under the law to find that the meat was not adulterated. Yet, the trial court removed this issue from the fact finders and instructed them as a matter of law that it was a crime to pick up meat and put it in an edible container. This deprived the petitioners of a jury trial on the most essential element of the case and violated their right to a fair trial.

The damage done by the instruction is clear in light of the testimony offered by both the prosecution and the defense. Both sides accepted the testimony of Dr. Huckins and Inspector Hairston that meat may be reconditioned after it has fallen on the floor. The petitioners conceded, and specifically offered Dean's testimony to prove, that they trimmed meat after it had fallen. Thus, this conduct was never disputed.

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[13] Not a single witness testified to seeing a piece of meat that was filthy in an edible container on a single occasion.

Because the petitioners conceded that they had picked meat up from the floor and placed it in edible containers, and because the trial judge did not tell the jury that it was lawful for the petitioners to place meat in an edible container after it had fallen on the floor as long as it was reconditioned, the jury was compelled to return a guilty verdict as a matter of law as long as it followed the instructions of the trial judge. As soon as the trial judge gave his instruction, petitioners' counsel recognized the dramatic prejudice to the defense that was sure to result. Counsel objected to the instruction and stated "you then added a very important and in our opinion devastating qualification, and I would respectively submit almost a directed verdict." (J.A. at 851) The trial judge indicated that he intended to give the challenged instruction and he specifically refused to give a further instruction to the jury. (J.A. at 853)

The effect of the trial judge's instruction was to remove from the jury a critical element of the case and thus to violate *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and *Connecticut* v. *Johnson*, 460 U.S. 73 (1983).

Moreover, the trial judge did not give the jury any instruction on the meaning of the word "transport." A reasonable jury might well have taken the term to mean "carry away." If so, the *sua sponte* instruction would also have required the jury to find transport, since the petitioners did not contest that they picked up meat, carried it off, reconditioned meat and put it in edible containers. The instruction might have directed a verdict on two essential elements of the government's case.

### B. The Prosecutor's Deliberate Violation Of A Court Order And Concealment Of Evidence Denied the Petitioners A Fair Trial

The following facts were not disputed in either the trial court or the court of appeals:

1. The trial court ordered the prosecutor to turn over the names of the petitioners' employees whom the government interviewed and who stated that they did not see the acts alleged by other employees. This order was entered because the witnesses would not talk to the defense and the defense was unable to prepare to put on its evidence.

2. The prosecutor personally interviewed two witnesses, Cook and Skottke, just one week before trial and each told him that he would swear that he did not see the acts alleged by other employees.

3. Just before trial, the petitioners represented to the trial judge that they were relying on the order the Court had entered.

4. The prosecutor, instead of revealing that Cook and Skottke had stated they would testify favorably for the defense, gave the petitioners notes made by an agent more than a year earlier which suggested that these witnesses did see the Koppels do various acts. These notes were never ratified by the witnesses, and Skottke specifically told the prosecutor the notes were incorrect.

5. As a result, the petitioners were led by the prosecutor to believe that these two witnesses would give inculpatory testimony. Moreover, the prosecutor subpoenaed the two witnesses, creating an impression that they were favorable to the government. The sole justification offered by the prosecutor for nondisclosure was that he could impeach Cook and Skottke by having the agent testify.

6. These witnesses had previously testified before a grand jury in 1983 and were no friends of the Koppels. When they came forward after the trial and revealed that they would have been favorable, the defense understood that it had been denied corroboration of its witness, Dean, who had been attacked as a friend of the petitioners.



Had the trial judge never entered the order, the petitioners would not be in quite the same position to complain. But there was an order, one that was entered specifically because the trial judge wanted to avoid a delay in trial and wanted to give the petitioners a fair chance to prepare a defense. Moreover, the petitioners expressed concern to the trial court that the prosecutor might be violating the order, and the prosecutor denied that he was in violation. (J.A. 27-30) The record indicates, however, that the prosecutor deliberately chose not to comply with the order and to conceal the names of Skottke and Cook. This alone would have been contempt of court and disregard for the judicial process, but the prosecutor was not satisfied with suppressing the names. He compounded his disregard for the court's order by turning over the agent's notes to mislead the petitioners into thinking that these witnesses would be favorable to the government.

Incredibly, the trial judge ruled that the test of whether a new trial should be granted on these facts is the usual test for newly discovered evidence, set forth in such decisions as *United States* v. *Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). (J.A. 919) Under this test, there is no way the petitioners could prevail, because they knew, of course, the existence of Cook and Skottke at the time of trial.[14] The court of appeals

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[14] At one point in his ruling denying a new trial, the trial judge stated that the witnesses had made inculpatory statements to the government. (J.A. 918) The fact is, however, that the government had no statements actually made by these witnesses that were inculpatory. It had an agent's notes that appeared to indicate that these witnesses would inculpate the defendants, but these notes could only have been used to impeach the witnesses. Skottke specifically stated that the agent's notes were incorrect. The fact that the agent who had been meeting with the employees making the allega-

declined to discuss the prosecutor's conduct in its opinion.

Petitioners contend that the prosecutor plainly violated duties imposed by this Court's decisions in *United States* v. *Agurs*, 427 U.S. 97 (1976), and *United States* v. *Bagley*, 473 U.S. ____, 105 S.Ct. 3375 (1985). In *Bagley*, the Government—i.e., the United States of America, a party to the instant case—suggested that a court might be especially likely to find prejudice when a prosecutor makes an incomplete response to a discovery request: "The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Id.* at 3384. That is exactly what occurred in the instant case.

### C. The Lower Courts Substituted A Felony Charge For The Misdemeanor Actually Charged By The Grand Jury And Thus Violated The Fifth Amendment

Two statutes are relevant to the question whether the grand jury charged a misdemeanor or a felony. The first is 21 U.S.C. § 610. It provides in relevant part as follows:

> No person . . . shall with respect to any . . . meat food products . . . (c) sell, transport, offer for sale or

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tions against the defendants had notes did not remove from the government the obligation to comply with the court's pretrial order and to provide the names of witnesses who were interviewed and who said they did not see the alleged acts. It appears that the trial judge erroneously concluded that the agent's notes were statements of these witnesses when they were nothing more than the agent's description of what he thought these witnesses would say. The notes are found in J.A. 868-69.

> transportation, or receive for transportation in commerce [adulterated meat].

The second statute is 21 U.S.C. § 676(a), which provides in relevant part as follows:

> Any person . . . who violates any provision of this chapter for which no other criminal penalty is provided by this chapter shall upon conviction be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if such violation involves intent to defraud, or any distribution or attempted distribution of an article that is adulterated . . . , such person . . . shall be subject to imprisonment for not more than three years or a fine of not more than $10,000 or both. . . .

Section 676(a) establishes that offenses set forth in the Meat Inspection Act are misdemeanors, unless they involve an attemmpt to defraud the United States or they involve the distribution or attempted distribution of adulterated meat. In Count 1 of the indictment the grand jury specifically charged the petitioners with a conspiracy to both defraud the United States and to distribute and attempt to distribute adulterated meat in commerce. Thus, the grand jury indicated that it knew how to charge the petitioners with a conspiracy to commit acts that are felonies under 21 U.S.C. § 676(a).

When the grand jury turned to Count 2 of the indictment, it chose not to use the words "distribution" or "attempted ditribution." Instead, it charged that "the petitioners, on various occasions did willfully and knowingly sell, transport, or offer for sale in commerce" adulterated meat.[15] This charge is plainly an effort to allege a

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[15] The trial judge told the jury that all of the activities of the plant were in commerce.

misdemeanor offense and nothing more.

It is well established in the law that transportation does not necessarily involve distribution or attempted distribution. Although there have not been many appellate decisions involving the Meat Inspection Act, there is ample authority in related areas as to the different meanings of the words "transport" and "distribute." For example, 21 U.S.C. § 802(11) defines distribution for purposes of the controlled substances laws as "to deliver (other than by administering or dispensing) a controlled substance." And, 21 U.S.C. § 802(8) defines "deliver" as "the actual, constructive, or attempted transfer of a controlled substance." These definitions give the words their common and their commonsense meaning.

Congress has demonstrated that when it wants to create a presumption that transportation is associated with distribution, it knows how to do so explicitly. *See, e.g.*, 18 U.S.C. § 1465 (creating a presumption with respect to transportation of two or more copies of any obscene material). The Meat Inspection Act contains no similar language, and it is clear from the fact that Congress uses the words "distribute" and "attempt to distribute" in the same penalty section where the word "transportation" also is used that Congress did not equate distribution and transportation.

Similiarly, Congress has recognized that the words "sale" and "offer to sell" have different meanings from the word "distribute." A sale takes place if there is an offer and an acceptance, even if distribution has not occurred. Thus, the existence of a sale is not proof of a distribution. Moreover, a seller may agree to sell one item and substitute another similar item so that what is distributed is not the same thing as originally offered for sale. For this reason, Congress has deliberatelly indicated the

instances in which it desires to punish identically either a "sale" or a "distribution." For example, in the obscene material statute cited above, 18 U.S.C. § 1465, Congress specifically punished transportation "for the purpose of sale or distribution."

As the controlled substances definitions indicate, Congress has provided in regulating dangerous substances that there is a difference between a mere sale or offer to sell and an actual distribution or attempted distribution. Under Congress' definitions of controlled substances, found in the same Title 21 where the Meat Inspection Act is located, proof a sale or offer to sell a controlled substance is not proof of a distribution or an attempted distribution.[16] The terms are distinct. Congress indicated on the face of the Meat Inspection Act that it was aware of the terms, sale, offer to sell, transportation, and distribution, and Congress chose to define only distribution and attempted distribution as felonies. In light of this, it is clear that Count 2 of the grand jury indictment—which deliberately avoided the words "distribution" and "attempted distribution" used in Count 1—intended to and did charge only a misdemeanor.[17]

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[16] The government also argued to the district court that it would benefit in understanding the Meat Inspection Act by focusing on cases decided under the controlled substances statute, also found in title 21. (Government's June 17, 1986 Memorandum, page 14).

[17] The government cited to the district court the following dictionary definition of "distribute": "to divide and dispense in portions; parcel out; to deliver or pass out." (Government's June 17, 1986 Memorandum, page 13). The government cited the following dictionary definition of "attempt": "to endeavor to do or make; to try." *Id.* The government failed to indicate, however, the most important thing about these definitions: *The jury was never asked to find that the defendants divided and dispensed anything, or that they parceled out*

The statutory scheme of the Meat Inspection Act is clear. Every single offer for sale of adulterated meat, every transportation or receipt for transportation of such meat, and every actual sale of such meat is a violation of the Meat Inspection Act under § 610 and therefore is automatically punishable as a misdemeanor under § 676. But, if the charge by the grand jury is that there was actual distribution or attempted distribution, or that the defendant had an intent to defraud, the violation is punishable at the felony level.

The trial judge disregarded the plain language of the statute on the ground that the legislative history of the 1967 amendment to § 676 indicated it was intended to protect consumers of meat. (J.A. 928) But, the district court paid insufficient attention to the way in which Congress determined to implement its protection. Prior to the 1967 amendment, the maximum punishment for a violation of the Meat Inspection Act was a fine of $10,000 and imprisonment for two years. Although the 1907 statute, 22 Stat. 1264, referred to violations of the Act as misdemeanors, the two year maximum punishment made violations of the Act felonies under 18 U.S.C. § 1(1). When Congress amended the statute in 1967, it specifically stated in the Senate Report accompanying the amendment that the Congress intended to change the penalty for most violations of the Act to a misdemeanor in order to facilitate prosecutions. 1967 U.S. Code Cong. & Ad. News, at 2207.

Under the district court's approach, the intent of the Congress is ignored, not furthered. Section 676 covers

*anything, or that they delivered or passed out anything*. Nor was the jury asked to find that the defendants endeavored to or tried to do any of these things. Thus, it is absolutely clear that the jury was never asked to find that there was distribution, even accepting the government's reliance on these dictionary definitions.

violations for which no other penalty is provided by the Act. In 21 U.S.C. § 622, Congress made bribery of federal officials a felony, the same approach it took to assault upon a federal officer under 21 U.S.C. § 675. Thus, the only section pursuant to which crminal penalties are imposed with any freuqency is § 610, and this is undoubtedly the section that Congress had in mind when it indicated that the penalty for most violations would be misdemeanors.

The trial court's construction of the language of the Meat Inspection Act defies logic and common sense. It also defies the fundamental principle that penal statutes are to be strictly construed. Finally, it is at odds with the only extended appellate discussion of the Meat Inspection Act, *United States* v. *Cattle King Packing Co.*, 793 F.2d 232 (10th Cir. 1986). In *Cattle King*, the court of appeals examined a prosecution charging *inter alia* (in count 9) that petitioners shipped adulterated meat to one company after it had been rejected by another buyer. *Id.* at 238. In its analysis of the statute, the court of appeals concludes that the offense charged was a felony, but only because the jury was instructed that the petitioners must have had an intent to defraud. Without such an instruction, the court indicated that the crime charged would have been a misdemeanor.[18] *Id.* at 240-41. Other district courts have

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[18] The legislative history indicates that Congress intended to borrow from the Food Drug and Cosmetic Act in amending the Meat Inspection Act. 1967 U.S. Code Cong. & Ad. News at 2194. The Food Drug and cosmetic Act defines the word "adulterated" in 21 U.S.C. § 342, and it prohibits acts similar to those prohibited by the Meat Inspection Act. For example, 21 U.S.C. § 331(k) prohibits any act that produces adulteration of food, drugs, devices or cosmetics held for sale after shipment in commerce. A violation of the statute is a misdemeanor under 21 U.S.C. § 333, the penalty section of the Food Drug and Cosmetic Act, which explicitly makes all violations misde-

recognized that the charge brought against the petitioners is clearly a misdemeanor. In an addendum to their Reply Brief in the court of appeals, petitioners included court records in other cases, pursuant to a request that judicial notice be taken under Fed.R.Evid. 201, that indicate that virtually identical charges to Count 2 have resulted in misdemeanor convictions.

The court of appeals does not clearly indicate whether it agreed or disagreed with the trial court. It states only that "[t]he indictment's language charging petitioners with a scheme to sell, transport or attempt to sell is the functional equivalent of the term 'distribution' as used in 21 U.S.C. § 676 (1982)." App. at 2a. The fact is, however, that the grand jury did not charge a scheme, and § 676(a) on its face uses the term "transportation" in excluding certain receipts of adulterated meat from the punishment provisions of the act. The statutory language plus its history indicates that Congress intended to distinguish trasportation and offers to sell from actual distribution or attempted distribution. Moreover, the grand jury chose to avoid the felony language in Count 2 that it used in Count 1, almost certainly because it did not wish to charge as a felony small isolated acts. The court of appeals substituted its charge for the one actually made in the indictment.

In doing so, it, as well as the trial court, violated this Court's holdings in *United States* v. *Miller*, 471 U.S. 130 (1985), and *Stirone* v. *United States*, 361 U.S. 212 (1960).

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meanors except when they involve "the intent to defraud or mislead." In borrowing this penalty approach for § 676 in the Meat Inspection Act, Congress plainly intended to make transport or offers to sell adulterated meat misdemeanors unless the government alleges and proves one of the enhancing conditions specifically provided in that section.

## CONCLUSION

For the reasons stated above, petitioners ask this Court to grant their petition for certiorari and to review and reverse the decision below. That decision is inconsistent with this Court's holdings on all three questions presented and is in conflict with the approach to the Meat Inspection Act taken by other courts.

Respectfully submitted,

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# APPENDIX

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**Docket Nos. 86-1324,**
**86-1331**

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UNITED STATES OF AMERICA,

*Appellee,*

v.

FORT PLAIN PACKING COMPANY, INC.,
LEOPOLD KOPPEL AND PAUL KOPPEL,

Defendants,

PAUL KOPPEL AND LEOPOLD KOPPEL,

*Defendants-Appelants.*

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United States Court of Appeals
Filed Oct 31 1986
ELAINE B. GOLDSMITH, CLERK
Second Circuit

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirty-first day of October, one thousand nine hundred and eighty-six.

PRESENT: HONORABLE WALTER R. MANSFIELD,
HONORABLE THOMAS J. MESKILL,
HONORABLE ROGER J. MINER,

*Circuit Judges.*

This is an appeal from a judgment of conviction entered in the United States District Court for the Northern District of New York, McCurn, *J.*, after a jury trial. Defendants were each convicted of violating the Federal Meat Inspection Act, 21 U.S.C. §§ 610, 676 (1982), by intentionally causing adulterated meat to enter into commerce.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED.

Defendant's argument that the evidence was insufficient to support the convictions is without merit. From the circumstantial evidence, the jury could have inferred that some of the adulterated meat entered into commerce. Second, the court's charge to the jury on the elements of the offense was not error when read in context of the charge as a whole. The district court correctly charged the jury that it must find guilt beyond a reasonable doubt with respect to each and every element of the crime. Third, concerning the unanimity issue, we have recently held that a general instruction on unanimity is sufficient to satisfy constitutional requirements in a case such as this. *United States* v. *Schiff*, slip op. 5817, 5831 (2d Cir. Sept. 15, 1986). Finally, we are satisfied that defendants were properly charged and convicted of a felony. The indictment's language charging defendants with a scheme to sell, transport or attempt to sell is the functional equivalent of the term "distribution" as used in 21 U.S.C. § 676 (1982). For the foregoing reasons, the judgment of the district court is affirmed.

/s/_____
WALTER R. MANSFIELD, U.S.C.J.

/s/_____
THOMAS J. MESKILL, U.S.C.J.

/s/_____
ROGER J. MINER, U.S.C.J.

*N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.*